

June 26, 2020

VIA ECF

The Honorable Theodore D. Chuang
United States District Judge
U.S. District Court for the District of Maryland
6500 Cherrywood Lane, Suite 245A
Greenbelt, MD 20770

Re: *American College of Obstetricians and Gynecologists v. U.S. Food and Drug Administration*, Case No. 20-1320

Hon. Judge Chuang:

In Plaintiffs' Reply Memorandum in Support of Motion for Preliminary Injunction, Plaintiffs cited *People First of Alabama v. Merrill*, No. 2:20-cv-00619-AKK, 2020 WL 3207824 (N.D. Ala. June 15, 2020). Yesterday, the Eleventh Circuit denied an emergency motion by the defendants in that case for a stay of the preliminary injunction pending appeal. *People First of Ala. v. Sec'y of State for the State of Ala.*, Case No. 20-12184 (11th Cir. June 25, 2020), attached hereto as Ex. A.

People First is analogous to the case at bar on both the facts and the law. In *People First*, the plaintiffs challenged, *inter alia*, two prerequisites to absentee voting—one requiring notarization or witness signatures and the other requiring the voter to photocopy their identification—because they force voters to subject themselves to increased risk of contracting COVID-19 in order to exercise their constitutional right to vote.

The Eleventh Circuit analyzed the constitutionality of these restrictions by applying a balancing test which, much like the undue burden test applicable to abortion restrictions, requires the court to weigh the burdens imposed by the restriction against the state's interests, and under which "the burden, no matter how slight, . . . must be justified by relevant and legitimate state interests sufficiently weighty to justify the limitation." Ex. A at 16 (citations and internal quotation marks omitted).¹

In rejecting defendants' argument that the burden was minimal, the Eleventh Circuit explained that, much like in the instant case, "the burden is tied to the fact that Plaintiffs and those similarly situated must risk death or severe illness to fulfill Alabama's absentee voter requirements and, therefore, to exercise their right to vote." *Id.* at 18.

¹ While the opinion is styled as a concurrence, it lists two of the three judges on the panel as authors and thus is an opinion of the majority of the panel.

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The Court rejected the defendants' suggestion that the risks voters face when forced to leave their homes during the pandemic are "comparable to the normal risk faced 'when we leave home,'" noting that the defendants' "failure to acknowledge the significant difference between leaving one's home to vote in non-pandemic times" and the risks faced now "reflects a serious lack of understanding of or disregard for the science and facts here." *Id.* at 18-19. The Eleventh Circuit found that, when balanced against the "significant, if not severe, burdens," *id.* at 19, imposed on voters by requiring them to come into contact with others in order to procure the signatures of a notary or two witnesses and a copy of their identification, the state's interests were insufficient to justify the requirements, *id.* at 18-21.

Respectfully submitted,

/s/ John Freedman

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CERTIFICATE OF SERVICE

I hereby certify that this document will be served on the Defendants in accordance with Fed. R. Civ. P. 5.

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